

2004

State of Utah v. Cheriff Sarkis Mahi : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH.

Plaintiff/Appellee,

vs.

CHERIFF SARKIS MAHI,

Defendant/Appellant.

Case No. 20040080-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE
OF UTAH, FROM A CONVICTION OF AGGRAVATED BURGLARY, A FIRST
DEGREE FELONY, AND AGGRAVATED ASSAULT, A THIRD DEGREE FELONY,
BEFORE THE HONORABLE J. DENNIS FREDERICK

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UTAH COURT OF APPEALS
BRIEF

UTAH

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IN THE UTAH COURT OF APPEALS

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ARGUMENT

POINT I

THE ISSUE OF WHETHER THE STATE COMPLIED WITH 120-DAY DISPOSITION STATUTE AND THEREFORE WHETHER DISMISSAL WAS APPROPRIATE WAS SUFFICIENTLY PRESERVED BELOW

The State's first claim, that Mahi did not preserve the issue of whether the State complied with the 120-day disposition statute sufficiently to trigger the trial court's duty to rule on the proceeding, is incorrect. As the State correctly noted "[i]n order to preserve an issue for appeal, it 'must be raised in a timely fashion, must be specifically raised such that the issue is sufficiently raised to a level of consciousness before the trial court, and must be supported by evidence or relevant legal authority.'" *State v. Richins*, 2004 UT App 36, ¶ 8 (quoting *State v. Schultz*, 2002 UT App 366, ¶ 19, 58 P.3d 879 (quotations and citations omitted)). As will be demonstrated, the 120-day disposition issue was preserved in this case.

The State noted in its brief, before the jury was impaneled, that there was an unrecorded bench conference ®. 165:5). After the jury was impaneled, the court reminded defense counsel that "[o]ne thing you wanted to address, Mr. Simms, at this

stage, was the 120-day notice of disposition, which was apparently filed by the defendant.

.. “ ®. 165: 28). Mahi, through counsel, then presented to the court the following:

Mr. Simms [defense counsel]: These are the documents that the defendant handed me this morning. I think his argument is that he gave the jail authorities the 120-day disposition on June 20th, despite the fact that it’s marked by the jail officials as July 12, 2003.

The Court: That’s his position?

Mr. Simms: Yes.

The Court: Do you wish to respond, Mr. Knell?

Mr. Knell [prosecutor]: Yes, your honor. I believe my copy also says June 20th. I guess it wasn’t received by jail personnel until July 15th. However, I think there was a good faith exception here, in that the defendant was not transported on several occasions, at least three or four, when he wasn’t transported. So I would argue that the defendant himself has caused any undue delay.

The Court: It is clear that the date that apparently Mr. Mahi placed on the notice was 20, June.

It is also clear that the state, or excuse me, that the jail authorities, jail authorities placed the date of 15, July. That then creates, I suppose, an issue of fact in that scenario, which we can not address here today.

This is the first time that it has come to my attention that we had an issue of this nature being presented. I’ll grant you the original , or a copy of this document was filed on July 17th in the court file. At the time the file was still winding its way, I believe, to this court from the preliminary stages.

So without ruling on the propriety or impropriety of the motion, *you have preserved your record in that regard.*

®. 165:28-30 (emphasis added)).

From this exchange it appears to be clear that the issue of whether the state had complied with the 120-day disposition statute was sufficiently raised and addressed by all parties present. First, there was previously an unrecorded bench conference during which the issue was likely discussed, perhaps in even greater detail, and that the Court was aware of the issue evidenced by the trial judge’s specific reminder to defense counsel of the one thing he wanted to address- the 120-day notice of disposition. ®. 165:5).

Second, the State also clearly understood the 120-disposition issue was before the

court and therefore addressed the merits of the argument. Specifically, the state implicitly argued that the case should not be dismissed because the delays should be attributed to the defendant who was not transported for several previous hearings. ®. 165: 29).

Finally, the Court manifested its clear understanding of the 120-day disposition issue raised by Mahi by recognizing the discrepancy between the date Mahi placed on the notice by Mahi and the date he claimed to have delivered it to the jail authorities, and the date marked by the jail authorities on the notice as having been received. ®. 165: 29). The trial court specifically recognized this created an issue of fact that it could not address that day and stated that “without ruling on the propriety or impropriety of the *motion*, you have preserved your record in that regard, Mr. Simms.” ®. 165:29-30(emphasis added)).

It is clear then, that the 120-day disposition motion, including the implicit consequence of dismissal for the State’s alleged failure to comply with the statute, was “sufficiently raised to the level of consciousness before the trial court” in that the trial judge recognized it was addressing *a motion* and that the issue was *preserved* for the record. *State v. Richins*, 2004 UT App 36, ¶ 8 (quoting *State v. Schultz*, 2002 UT App 366, ¶19, 58 P.3d 879 (quotations and citations omitted)). Furthermore, the issue raised was “supported by evidence or relevant legal authority” which, in this case, was Mahi’s claims that he delivered the 120-day notice prior to the day marked on it by the jail authorities and the date of June 20th on the document signed by Mahi. (*Id.*). The State’s argument that this issue was not preserved is, therefore, without merit.

POINT II

THE ISSUE OF WHETHER THE 120-DAY DISPOSITION PERIOD HAD LAPSED PRIOR TO TRIAL IS IN PART A FACTUAL DETERMINATION WHICH THE TRIAL COURT FAILED TO MAKE AND WHICH IS NECESSARY FOR A MEANINGFUL APPELLATE REVIEW

The State next claims that regardless of whether the 120-day disposition issue was preserved, the defendant was tried within the 120-disposition period and was therefore not entitled to dismissal of the information. This argument, however, is without sufficient support in the record to be upheld. As set out above, there remained an undecided issue of fact that the trial court implicitly correctly recognized would have a direct bearing on the issue of whether the State had complied with the 120-day statute. (®. 165:29). That undecided issue is when was the 120-day notice delivered to the jail authorities? Was it, as Mahi claimed, the date on which he signed the notice and claims to have delivered it to the jail authorities, or was it the date on the top of the notice placed there by the jail authorities as having been received?

The answer to this question bears directly on the question of whether the State complied with the 120-day disposition statute requiring the State to bring the defendant to trial within 120 days of the date the notice was delivered to jail authorities. The trial court correctly recognized this discrepancy as creating an issue of fact, the determination of which was necessary to the resolution of the issue. Unfortunately, however, the trial court simply stated that it was an issue that could not be addressed that day and “without ruling on the propriety or impropriety of the motion” the record had been preserved. (®. 165:29-30).

Such a situation leaves this Court in the position of having to make findings of fact that are necessary to the determination of an issue preserved below but not ruled upon. As this Court has set forth time and time again factual determinations are the exclusive purview of the fact finder (in this case the trial judge) which is in a better position of hearing the relevant evidence personally, observing the demeanor of the witnesses, and assessing their credibility or lack thereof. *American Fork City v. Singleton*, 57 P.3d 1124,

1125-1126 (Utah App. 2002)(quotations and citations omitted)(See also *South Salt Lake City v. Terkelson*, 2002 UT.App. 405, ¶16, 61 P.3d 282 (Utah.App. 2002). It is for this reason that the State's argument that Mahi was tried within the 120-day disposition period cannot prevail- because this Court cannot come to that conclusion without the aid of a proper proceeding and appropriate factual findings below.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons and the reasons stated in the original brief, Mahi asks this Court to reverse his conviction and/or remand his case to the district court to make specific findings of fact regarding the issue of when the 120-day disposition notice was delivered to jail authorities in order to reach a proper resolution of his claim that the State did not bring him to trial in a timely manner as prescribed by statute.

RESPECTFULLY SUBMITTED this 18th day of July, 2005.


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CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 18th day of July, 2005.


